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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
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9 EDWARD LEE BEETS,

10 Petitioner,

11 vs.

12 E.K. McDANIEL, *et al.*,

13 Respondents.
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) 2:04-CV-00085-KJD-GWF
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ORDER

15 I. Introduction

16 On May 16, 2006, petitioner Edward Lee Beets filed a Motion for Leave to Conduct
17 Discovery (docket #18), along with seven volumes of exhibits in support of the motion (docket #19-
18 40). On September 28, 2006, respondents filed an opposition to the discovery motion (docket #47)
19 together with a Motion to Dismiss Petition for Writ of Habeas Corpus (docket #46). On December
20 1, 2006, Beets filed an opposition to the respondents' motion to dismiss (docket #49) and a reply to
21 the respondents' opposition to his discovery motion (docket #50). Respondents have not filed a
22 reply to Beets's opposition to the motion to dismiss. Having considered all of the foregoing
23 submissions, the court will grant Beets's discovery motion in part and deny respondents' motion to
24 dismiss.

25 II. Background

26 In its opinion on petitioner's direct appeal, the Nevada Supreme Court described the

1 factual background of this case as follows:¹

2 Appellant Edward Beets was Vanita Hames' boyfriend for approximately four
3 months. Sometime after Christmas 1988, Vanita broke off her relationship with appellant.
4 Vanita lived in North Las Vegas with her mother, Oretha Hames, aged 71, her daughter,
5 Nicole, aged 7, and her son, Christian, aged 1-1/2.

6 At approximately 3:00 or 4:00 a.m. on March 10, 1989, Vanita awoke to find
7 appellant standing over her. Vanita asked appellant what he was doing there and,
8 when he did not reply, she ran out of her room to the kitchen to use the telephone. The
9 telephone did not work as the telephone lines leading into the home had been cut.

10 Vanita then saw appellant walk toward her, enter her bedroom, and re-emerge
11 with a pillowcase which had been in the linen closet. Appellant withdrew a hammer
12 from the pillowcase, which Vanita recognized as one she kept in a kitchen drawer
13 with other tools. Appellant chased Vanita through the living room, caught her and hit
14 her on her back two or three times with the hammer. Vanita heard her mother, Oretha,
15 yell, "What's going on in there." Oretha then opened her bedroom door, saw
16 appellant, and told him to stop and get out. When Oretha walked toward appellant, he
17 hit her with the hammer once on the top part of her body and she fell.

18 Vanita crawled around the furniture in an attempt to get away from appellant,
19 but he caught up with her in the hallway and dragged her into the bathroom. Vanita
20 was crying and screaming and appellant told her to be quiet before she woke up the
21 children. Vanita could hear her mother moaning and having difficulty breathing.
22 Inside the bathroom, appellant again hit Vanita with the hammer, including a blow to
23 the back and a blow which broke her arm. Appellant then tied Vanita's hands and feet
24 with a torn sheet and then left, closing the door. Vanita was unable to get loose from
25 the bindings.

26 About ten minutes later, appellant returned to the bathroom with a sofa
cushion which he placed under Vanita's broken arm. Appellant then untied her,
opened his fly, and took off her underpants. Appellant knelt between Vanita's legs and
waved the hammer around as if he was going to hit her between her legs. He then
turned the end of the hammer around and stuck the handle up her vagina.

Appellant left the bathroom with the door open and returned about a minute
later with a kitchen knife. Appellant told Vanita he was going to kill her and then
himself. Appellant knelt in front of her and, with both hands on the knife, stabbed her
near her left breast. Appellant threw the knife down, turned off the bathroom light,
and left, closing the door.

About ten minutes later, Vanita heard appellant walk toward the children's
room. Vanita felt around for the knife, left the bathroom, and lunged at appellant with
the knife. Appellant knocked the knife out of her hand and hit her across the face with

¹ The court sets forth this background information, as stated by the Nevada Supreme Court, only to provide the context for this order. The court does not intend to make any finding with respect to the facts stated in this section of this order.

1 his fist. He again dragged Vanita to the bathroom, pushed her down and, with the
2 hammer, hit her on the knees and on the side of her head. Appellant closed the
bathroom door and left. After a few minutes, Vanita heard her daughter crying and
3 heard her say, "No, no."

4 Vanita got up and went to her daughter's room and found Nicole lying on the
bed with her ankles tied. Vanita went into the kitchen to get a knife to cut the
5 bindings. Vanita gave the knife to Nicole, who cut the bindings, and told Nicole to go
to a neighbor's house for help. Vanita then went into the living room where she found
6 her mother lying face down on the floor. She turned her over and knew she was dead.

7 Nicole testified regarding appellant's acts in her bedroom. Appellant entered
Nicole's bedroom with no clothes on. He climbed into bed with Nicole and removed
8 her underwear. Appellant then laid on top of Nicole and stuck his finger and penis in
her vagina. Appellant left the room and returned a few seconds later and tied her arms
9 and legs. Appellant then left again.

10 As a result of her injuries, Vanita still could not lift her wrist at trial on August
1, 1989, due to nerve damage. Vanita testified she did not know if she would be able
11 to use her wrist again.

12 Appellant was charged with the following: burglary; first degree murder with
use of a deadly weapon, victim 65 years of age or older; attempted murder with use of
13 a deadly weapon; mayhem with use of a deadly weapon; first degree kidnaping with
use of a deadly weapon; sexual assault with use of a deadly weapon; and two counts
14 of sexual assault with a minor.

15 At the close of the State's case at trial, appellant moved to dismiss the
kidnaping and mayhem charges. The district court denied the motion as to both
16 charges. The jury found appellant guilty on all counts. At the penalty hearing, the
State introduced two judgments of conviction, one for robbery in April, 1980, and one
17 for burglary in April, 1985. The defense called witnesses who testified that appellant
suffered several serious head wounds as a child and testified regarding appellant's
18 good character.

19 The jury was deadlocked and unable to reach a verdict after the penalty phase.
In an order filed August 15, 1989, we ordered a three judge panel to conduct a penalty
20 hearing pursuant to NRS 175.556. At the second penalty hearing, the judges indicated
that they had reviewed the transcripts of the previous proceedings, both the guilt and
21 penalty phases.

22 The three judge panel found no mitigating circumstances and the following
four aggravating circumstances: (1) the murder was committed by the defendant while
under a sentence of imprisonment, to wit: Burglary; (2) the murder was committed by
23 the defendant who was previously convicted of a felony involving the use or threat of
violence to another, to wit: Robbery; (3) the murder was committed while the
24 defendant was engaged in the commission of sexual assault; and (4) the murder was
committed while the defendant was engaged in the commission of burglary. On
25 November 7, 1989, appellant was sentenced to death.

26 *Beets v. State*, 107 Nev. 957, 959-961, 821 P.2d 1044, 1046-47 (1991) (footnotes omitted). The

1 Nevada Supreme Court affirmed Beets's conviction as to all counts and his death sentence. *Id.*, 107
2 Nev. at 965, 821 P.2d at 1050.

3 On September 3, 1993, Beets filed a petition for writ of habeas corpus in the Eighth
4 Judicial District Court for Nevada, the court in which he was convicted. Within the context of that
5 proceeding, Beets filed a motion for partial summary judgment in which he argued that his death
6 sentence is invalid because the Nevada Supreme Court's decision on his direct appeal did not include
7 an opinion in which a majority of the court concurred that the penalty-phase jury's consideration of
8 improper aggravating circumstances amounted to harmless error. The state district court denied the
9 motion; and, the Nevada Supreme Court rejected, on jurisdictional grounds, an appeal of that denial.
10 *Beets v. State*, 110 Nev 339, 871 P.2d 357 (1994).

11 On September 29, 2000, the state district court held an evidentiary hearing on Beets's
12 petition. On February 20, 2002, the state district court entered an order denying relief. Beets
13 appealed. On October 7, 2003, the Nevada Supreme Court affirmed the lower court's denial of his
14 petition, but directed Beets to file a separate petition in state district court raising a claim pursuant to
15 *Atkins v. Virginia*, 536 U.S. 304 (2002). According to Beets's current motion, he filed that state
16 petition on January 27, 2004, four days after he filed the petition that initiated this action.

17 III. Standards Governing Discovery in Habeas Corpus Actions

18 Rule 6 of the Rules Governing Section 2254 Cases in the United States District
19 Courts states: "A party shall be entitled to invoke the processes of discovery available under the
20 Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion
21 and for good cause shown grants leave to do so, but not otherwise." The Supreme Court has
22 construed Rule 6, holding that if through "specific allegations before the court," the petitioner can
23 "show reason to believe that the petitioner may, if the facts are fully developed, be able to
24 demonstrate that he is ... entitled to relief, it is the duty of the court to provide the necessary facilities
25 and procedures for an adequate inquiry." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (quoting
26 *Harris v. Nelson*, 394 U.S. 286, 300 (1969)).

1 The Ninth Circuit Court of Appeals has pointed out that “[a] habeas petitioner does
2 not enjoy the presumptive entitlement to discovery of a traditional civil litigant.” *Rich v. Calderon*,
3 187 F.3d 1064, 1068 (9th Cir. 1999) (citing *Bracy*, 520 U.S. at 903-05). “Rather, discovery is
4 available only in the discretion of the court and for good cause shown....” *Id.* The court instructed:

5 Habeas is an important safeguard whose goal is to correct real and
6 obvious wrongs. It was never meant to be a fishing expedition for
habeas petitioners to “explore their case in search of its existence.”

7 *Rich*, 187 F.3d at 1067. Accordingly, a habeas petitioner will not be granted leave to conduct
8 discovery based on allegations that are purely speculative or without any basis in the record. On the
9 other hand, a petitioner is not necessarily required to plead specific facts entitling him to habeas
10 relief *prior* to obtaining leave to conduct discovery.

11 Indeed, based on the the Supreme Court’s decision in *Bracy*, a petitioner may be able
12 to establish “good cause” for discovery even though he posits only a plausible “theory” for relief. In
13 *Bracy*, the petitioner sought discovery to support a claim that, because the judge in his case was
14 convicted of taking of bribes from some criminal defendants, he was prone to “a sort of
15 compensatory bias against defendants who did not bribe [him].” *Bracy*, 520 U.S. at 905. Although
16 the petitioner had not alleged facts sufficient to establish that his particular case was infected by such
17 bias, the Supreme Court found that he was nonetheless entitled to conduct discovery based on
18 evidence that “lend[ed] support” to an actual bias claim. *Id.* at 909. Thus, a petitioner seeking leave
19 to conduct discovery is not required to show that the requested discovery is likely to lead to habeas
20 relief, only that there is “reason to believe” that it “may” do so. *Id.* at 908-09.

21 IV. Analysis

22 Beets identifies six theories of relief he seeks to explore by means of discovery. He
23 asks permission to conduct discovery to assist him in showing: (1) that trial counsel were ineffective
24 in failing to present mitigation evidence, (2) that he is ineligible for the death penalty because he is
25 mentally retarded, (3) that the imposition of his death sentence by a three-judge panel violated his
26 right to a reliable sentencing determination, (4) that he was denied his right to meaningful appellate

1 review and an impartial jury, (5) that the state failed disclose material exculpatory and impeachment
2 evidence, and (6) that lethal injection as implemented in Nevada constitutes cruel and unusual
3 punishment. Beets supports each of these requests with factual allegations that are discussed below
4 to the extent necessary to address his discovery requests. In addition, Beets has submitted, with his
5 motion, the proposed subpoenas he intends to serve should the court grant him leave to conduct the
6 discovery he requests. Docket #19-21.

7 Under the rubric of claiming that Beets has failed to meet the discovery standard
8 articulated in *Bracy*, respondents raise several objections to granting Beets leave to conduct
9 discovery. First, respondents contend that Beets has not established “good cause” for discovery
10 because he has not properly placed cognizable habeas claims before this court in the manner
11 prescribed by Rule 2 of the Rules Governing Habeas Corpus Cases Under Section 2254.²

12 Filed prior to appointment of counsel, Beets’s petition does not contain grounds for
13 relief drafted specifically for this federal habeas proceeding. Docket #1. Instead, it simply
14 incorporates by reference the constitutional claims raised in his attached state appellate briefs. *Id.*
15 According to the respondents, this form of pleading is fatal to Beets’s motion to conduct discovery
16 because he is unable to link any of his proposed discovery requests to a specified claim in a properly
17 pleaded petition. Alternatively, respondents argue that, even if the court were to forgive Beets’s
18 pleading format, he seeks discovery for claims not contained in the incorporated state court briefs.

19 Respondents have not directed the court to any controlling authority that states that
20 the “claim” for which a petitioner seeks discovery must be contained within the four corners of his
21 habeas petition. Rule 6 imposes no such a requirement. The Supreme Court in *Harris* and in *Bracy*
22 spoke of the petitioner placing “specific allegations before the court,” but neither case specifically
23 holds that the allegations must be located in the habeas petition, as opposed to a motion for leave to
24 conduct discovery or other appropriate document filed with the court. *Bracy*, 520 U.S. at 908-09;

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26 ² Respondents objection to Beets’s pleading format also serves as the basis for their motion to
dismiss his habeas petition. See discussion in section VI., below.

1 *Harris*, 394 U.S. at 300. The respondents having advanced no persuasive reason to do otherwise,
2 this court shall consider factual allegations set forth in Beets' discovery motion in determining
3 whether he has established good cause for the discovery he requests.

4 Next, respondents note that Beets seeks discovery for claims that are unexhausted or
5 that are procedurally defaulted. Though not cited by the respondents, there are a few Ninth Circuit
6 cases, decided pre-*Bracy*, that support the position that discovery should only be permitted in
7 relation to claims for which the petitioner has exhausted state court remedies. *See, Calderon v.*
8 *United States District Court (Roberts)*, 113 F.3d 149 (9th Cir. 1997); *Calderon v. United States*
9 *District Court (Hill)*, 120 F.3d 927 (9th Cir. 1997); *Calderon v. United States District Court*
10 *(Nicolaus)*, 98 F.3d 1102 (9th Cir. 1996). In each of those cases, however, there is at least one salient
11 procedural fact that makes the case distinguishable from the present case. (In *Hill*, for example, the
12 petitioner had "yet to file a petition for habeas corpus relief in state or federal court" before seeking
13 discovery in federal court. 120 F.3d at 928.) In addition, it is at least arguable that *Bracy* broadened
14 the habeas court's discretion by permitting discovery based on a showing of "good cause" alone,
15 without requiring the court to first delve into and resolve more complex procedural issues, such as
16 exhaustion and procedural default. *See McDaniel v. United States District Court (Jones)*, 127 F.3d
17 886, 888 (9th Cir. 1997). Thus, while the procedural viability of a petitioner's claims may be a
18 legitimate factor for the court to consider in deciding whether to allow discovery, this court is not
19 convinced that it is precluded from allowing Beets to conduct discovery until it is satisfied that his
20 claims for relief will be free from procedural impediments.

21 Respondents also contend that the court should deny Beets' request to conduct
22 discovery because he failed to develop the facts in support of his claims while in state court. In
23 making this argument, respondents rely primarily on *Williams v. Taylor*, 529 U.S. 420 (2000),
24 wherein the Supreme Court addressed the habeas petitioner's obligation to diligently seek factual
25 development of his claims in state court. *Id.* at 437. The issue presented in *Williams* was whether
26 the petitioner was barred from obtaining an evidentiary hearing under 28 U.S.C. § 2254(e)(2). *Id.* at

1 424.

2 The determination as to whether the district court may or must hold an evidentiary
3 hearing is separate and distinct from whether the court shall, in its discretion, permit a petitioner to
4 conduct discovery. *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir.1997). Although *Jones v. Wood*
5 was decided under the pre-AEDPA³ version of section 2254, respondents have cited the court to no
6 controlling or persuasive authority that § 2254(e)(2) restricts discovery in the same manner that it
7 restricts evidentiary hearings. And, as with the exhaustion and procedural default analyses, the §
8 2254(e)(2) analysis implicates issues that the court, in its discretion, chooses to not address at this
9 stage of the proceedings.⁴ Accordingly, the court shall not deny Beets's discovery request based
10 respondents' unsubstantiated contention that Beets failed to pursue the factual development of his
11 claims in state court.

12 The court now turns to the theories of relief for which Beets's seeks discovery and the
13 specific requests he makes in relation to each theory.

14 A. Trial counsel were ineffective in failing to present mitigation evidence.

15 In his motion, Beets alleges that his trial counsel were ineffective failing to
16 investigate and present mitigating evidence, specifically, information regarding his mental illness
17 and developmental limitations. He claims that he was prejudiced by counsel's ineffectiveness in this
18 regard because "it prevented counsel from proving that [he] was not competent to stand trial, that his
19 mental state was insufficient to find the specific intent necessary for premeditation, and that his
20 moral culpability did not rise to the level necessary for imposition of the death penalty." Docket
21 #18, p. 27. In relation to this ineffective assistance claim, Beets also alleges that policies and
22 practices, as well as budget and staffing issues, within the Clark County Public Defenders' Office

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24 ³ Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214.

25 ⁴ For example, the court would need to resolve the threshold issue of whether "there [was] lack
26 of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams*, 529
U.S. at 437. Because the complete state court record has yet to be filed herein, the court is currently
unable to conduct that inquiry.

1 adversely impacted counsel's ability to effectively develop mitigation evidence on Beets's behalf.

2 Based on the evidence placed before it thus far, the court reserves doubt that Beets
3 will be able to show that his mental impairments rendered him incompetent to stand trial or unable to
4 form the specific intent necessary for premeditation. Nonetheless, Beets has provided sufficient
5 reason to believe that a more thorough investigation and presentation of mental health evidence by
6 counsel may have benefitted his chances for a more favorable outcome in the penalty phase of his
7 trial. Accordingly, the court will permit to Beets to conduct requested discovery as follows.

8 The court will grant Beets's request for permission to depose the following
9 individuals: (1) E. Eugene Martin, the attorney who represented Beets in pre-trial proceedings and
10 who conducted the mitigation investigation; (2) Thomas Casler, investigator for Beets's state habeas
11 counsel; (3) William Evans, Beets's elementary school principal when Beets was in the fifth and
12 sixth grade; and (4) Cranford Crawford, Beets's juvenile probation officer.

13 The court will not grant Beets's request for permission to depose Shirley Barber, a
14 teacher and administrator at an elementary school Beets attended, or J.D. Beets, Beets's uncle. The
15 declarations that Beets has offered in support of his request to depose these individuals fail to
16 establish that either would have information to offer that would be particularly helpful to Beets's
17 pursuit of habeas relief. See J.D. Beets's Declaration, Exhibit 3.04, and Barber's Declaration,
18 Exhibit 3.42.⁵ Unlike the declaration of William Evans (Exhibit 3.41), which contains fairly specific
19 details about Beets's academic performance, mental and functional capacity, and learning
20 impairments, Barber's declaration contains only scant, non-specific information about Beets's
21 personality and his IQ. And, while J.D. Beets's declaration recounts a change in his nephew's
22 behavior and personality attributable to a tragic train accident when Edward was five years old, the
23 declaration fails to establish that J.D. had any appreciable contact with Edward after the age of six.

24 As for Beets allegations about institutional constraints within the Clark County Public
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26 ⁵ Unless otherwise noted, the "Exhibits" referred to herein were submitted with Beets's
discovery motion and are located at docket #19 through #40.

1 Defenders' Office, the court views these allegations as being a step removed from the question of
2 whether Beets is entitled to habeas relief due to ineffective assistance of counsel. Even if proven,
3 these allegations would not help establish *whether* counsel's performance fell below the
4 constitutional standard. At most, they would only provide a reason *why* counsel's performance was
5 compromised to such an extent. Accordingly, the court will decline Beets's request for permission
6 to depose Morgan Harris, the Public Defender for Clark County at the time of Beets' arrest and trial.

7 Beets's request to depose the custodian of records for the NDOC is also denied.
8 Beets states that he wishes to depose this person "to obtain discovery regarding [NDOC's] record
9 storage and retention policies." He contends that, because the NDOC does not maintain all of his
10 records in one location, this proposed deposition will assist him in showing that trial counsel was
11 ineffective in failing to investigate and present the allegedly decentralized records at trial. Failing to
12 discern a sufficient nexus between the NDOC's record-keeping policies and the question of trial
13 counsel's ineffectiveness, the court does not find good cause to authorize the deposition.

14 The court will, however, permit Beets to serve his proposed subpoena duces tecum on
15 the Nevada Highway Patrol (Exhibit 1.10).⁶ This subpoena is seeks production of records
16 concerning Beets that are maintained in the state's Central Repository for Nevada Records of
17 Criminal History. *See Nev. Rev. Stat. 179A.075.* While Beets has not shown that the repository is
18 likely to contain records that would bear upon whether counsel was ineffective for failing to
19 investigate his alleged mental limitations, the court is of the opinion that such records should be
20 available to a capital habeas petitioner to the extent that they document his personal information and
21 criminal history.

22 With respect to Beets's remaining discovery requests relating to his ineffective
23 assistance claim, the court shall permit him to subpoena a copy of his work records from Caesar's
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25 ⁶ The court notes, however, that Item 8 (regarding electronic data) in Attachment A of the
26 proposed subpoena would, as drafted, impose an unreasonable burden on the responding party. As such,
Beets shall be required to edit the subpoena as set forth in the court's orders below.

1 Palace (Exhibit 1.09) and the audio tape of a conversation between himself and his counsel that was
2 admitted into evidence in the state district court (Exhibit 1.13). And, while the court will permit
3 Beets to serve subpoenas on two Las Vegas television stations, he shall be limited to requesting only
4 video or audio footage that captures either himself or his court proceedings. Exhibits 1.14 and 1.15.

5 B. Beets is ineligible for the death penalty because he is mentally retarded.

6 Beets alleges that he is ineligible for the death penalty based on *Atkins v. Virginia*,
7 536 U.S. 304 (2002), wherein the Supreme Court held that the Eighth Amendment prohibits the
8 execution of a mentally retarded person. As noted above, Beets is currently pursuing relief under
9 *Atkins* in the Nevada courts. According to Beets, the state district court granted him discovery of
10 records maintained by the Nevada Department of Corrections (NDOC) and Ely State Prison (ESP),
11 but subsequently limited the scope of that discovery pursuant to a motion filed by the NDOC. Beets
12 now asks this court to grant him permission to conduct the broader discovery initially permitted by
13 the state court.

14 Granting this request would inevitably result in NDOC raising the same objections in
15 this court that it did in the state district court. Beets has offered no explanation or argument as to
16 why the state court's discovery ruling was erroneous or why this court would be required to resolve
17 the dispute in a different manner. Indeed, Beets has not even apprised this court of the specific
18 grounds for NDOC's objections or the basis upon which the state court sustained them.⁷ While
19 recognizing that it would not necessarily be bound by the state court's ruling (*see Breed v. United*
20 *States District Court*, 542 F.2d 1114, 1115 (9th Cir.1976), this court is not inclined to invite re-
21 litigation of the NDOC's objections in the absence of any showing that outcome would be different.
22 Therefore, the court will not authorize Beets to serve his proposed subpoena duces tecum on the
23 custodian of records at ESP (Exhibit 1.16).

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25 ⁷ Beets's motion contains citations to the state court's discovery orders, but his counsel
26 apparently did not see fit to include copies of the orders among the numerous exhibits submitted with
the motion. Docket #18, p. 33.

1 C. The imposition of his death sentence by a three-judge panel violated Beets's right
2 to a reliable sentencing determination.

3 Beets asserts that the procedure used to select the members of the three-judge
4 sentencing panel in Nevada capital cases was not random and resulted in use of "death prone
5 sentencers." In a dissenting opinion on Beets' direct appeal in the Nevada Supreme Court, Justice
6 Young concluded that Nevada's use of three-judge panels in death penalty cases⁸ did not meet
7 constitutional standards established by the United States Supreme Court because the procedure failed
8 to distinguish cases in which the death penalty was warranted from those which it was not *Beets v.*
9 *State*, 107 Nev. at 976, 821 P.2d at 1057-58 (citing to *Godfrey v. Georgia*, 446 U.S. 420, 427 (1979)).
10 Blaming Nevada's system of elected judges, Justice Young posited that three-judge panels imposed
11 the death penalty with far more frequency than juries because judges typically seek to curry favor
12 with voters by being tough on crime. *Id.*

13 The claim for which Beets now seeks discovery is based on a markedly different
14 theory than the one discussed by Justice Young in his dissent. Instead of pointing to Nevada's
15 system of popularly-elected judges as the reason for three-judge panels being death-prone, Beets
16 alleges that the panel selection procedure itself has historically produced a slant toward picking those
17 judges who are disposed toward imposing death. While not swayed by Beets's insinuation that the
18 selection process resulted in the selection of racially-biased panels, the court finds that he has
19 nonetheless advanced a plausible theory for habeas relief that warrants additional factual
20 development. *See Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (process that results in the selection
21 of jurors who fail to consider aggravating and mitigating circumstances in good faith violates the
22 Due Process Clause).

23 In an effort to develop this theory, Beets asks the court to permit him to serve a
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25 ⁸ Nevada law at the time mandated the use of three-judge panels when the jury was unable to
26 reach a unanimous sentencing verdict for a defendant convicted of first degree murder or when the
defendant had entered a guilty plea to first degree murder. *Beets*, 107 Nev. at 974-75, 821 P.2d 1056.

1 subpoena duces tecum requesting the Clerk of the Nevada Supreme Court to produce records
2 showing the manner in which three judge-panels were selected. Exhibit 1.12. Having reviewed the
3 proposed subpoena, the court finds the scope of Beets's request to be far too broad. Rather than
4 requesting materials concerning the selection process throughout its entire history, Beets shall be
5 limited to requesting only those materials that bear upon the selection process used in his particular
6 case.

7 D. Beets was denied his right to meaningful appellate review and an impartial jury.

8 Beets alleges that he was denied his constitutional right to meaningful appellate and
9 post-conviction review of the jury selection portion of his trial because the trial court denied his
10 counsel's request to transcribe those proceedings. He also alleges that his right to a fair trial and
11 impartial jury was violated as well. According to the declaration of Beets's trial counsel Stephen
12 Dahl, he (Dahl) designated that a transcript of the jury voir dire proceedings be included as part of
13 the record for direct appeal. Exhibit 4.30. Dahl also stated in his declaration that he prepared an
14 order directing the court reporter to prepare the transcripts he had designated, but that order was
15 subsequently edited (in handwriting), by someone other than himself, to exclude the transcript of jury
16 selection. *Id.* The order was signed by the trial judge, Charles Thompson, and Dahl surmised in his
17 declaration that Judge Thompson was the one who modified the order. *Id.*; Exhibit 4.20.

18 Based on a declaration of the court reporter, the transcripts at issue (or the source
19 from which they might be prepared) were likely destroyed several years ago in the accordance with
20 her standard practice. Exhibit 4.16. Accordingly, Beets now requests that this court grant him
21 permission to request prosecutor Dan Seaton's trial notes of the jury voir dire. For the reasons that
22 follow, the court shall deny Beets's request.

23 First, Dahl's declaration contains only speculation as to why he wanted the transcripts
24 in the first place. Exhibit 4.30. Rather than identifying a specific issue he wanted to pursue, Dahl
25 stated in his declaration that he "wanted to look carefully at the transcript to see if there were any
26 constitutional claims to raise." *Id.* Dahl further stated that, in the several cases in which he opposed

1 Mr. Seaton, he was frequently concerned about Seaton's use of peremptory challenges *vis a vis*
2 *Batson v. Kentucky*, 476 U.S. 79 (1986). *Id.* However, Dahl apparently has no recollection of a
3 *Batson* issue arising in Beets's case, nor do his own notes of the proceedings reflect that a *Batson*
4 objection was ever interposed. *Id.*

5 Second, Beets's allegations in support of this discovery request do not establish a
6 reason to believe that he may be entitled to habeas relief based either on the manner in which the jury
7 was selected in his case or on the fact that the transcripts at issue were not available for appellate or
8 post-conviction review. Other than Dahl's recollection that he had "concerns" about the jury
9 selection process, the only allegations Beets proffers to show that jury selection may have been
10 improper are that the selection process took only a half day to complete and that one of the struck
11 jurors was African-American. Docket #18, p. 41. According the declaration of investigator Robert
12 Beall, however, the racial make-up of the group of potential jurors who were not selected was the
13 same as that of the group of jurors who were selected. Exhibit 4.25.

14 Lastly, Beets has not established that the notes he seeks, to the extent that they exist,
15 are likely to contain a faithful recapitulation of the jury selection proceedings. In sum, the court
16 finds Beets's allegations regarding jury selection to be highly speculative and without evidentiary
17 support. As such, Beets has not shown good cause for discovery of the prosecutor's trial notes
18 relating to the voir dire process.

19 E. The state failed disclose material exculpatory and impeachment evidence.

20 Beets claims that good cause exists for him to obtain discovery to show that state
21 failed to disclose material exculpatory and impeachment evidence in the prosecution of its capital
22 case against him. However, rather than put forth specific allegations that might, with further
23 development, give rise to a claim for relief under *Brady v. Maryland*, 373 U.S. 83 (1963), and its
24 progeny, Beets points to three unrelated examples of the state's alleged failure to disclose evidence
25 or information in his case. None of these three examples, either alone or in concert, rises to the level
26 of a constitutional violation worthy of habeas relief. Beets also relies heavily on what he terms "a

1 pattern and practice in capital cases prosecuted by the Clark County District Attorney's Office of
2 failing to comply with constitutional disclosure obligations." Docket #18, pp. 41, 45-52.

3 The discovery Beets seeks based on the foregoing is complete disclosure of all
4 records remotely related to him and his crimes that might be in the possession of the Clark County
5 District Attorney's Office (CCDA) and five different divisions within the Las Vegas Metropolitan
6 Police Department (LVMPD). Exhibits 1.01-1.05, 1.08. Beets relies on *U.S. v. Blanco*, 392 F.3d
7 382, 394 (9th Cir. 2004), to argue that, because he has unearthed a few pieces of evidence or
8 information that should have been disclosed pursuant to *Brady*, there is a presumption that the state
9 is concealing additional exculpatory and impeachment evidence. Thus, according to Beets, this court
10 must allow full discovery from CCDA and LVMPD "for prophylactic reasons."

11 *Blanco* does not provide a basis for allowing the wide-ranging discovery Beets seeks
12 in this case. First, the Ninth Circuit's remand order in *Blanco* that the government "produce all
13 information in its possession pertaining to [a confidential informant]" was based on a finding that the
14 government had, in fact, suppressed information that should have been given to Blanco under *Brady*
15 and *Giglio*.⁹ *Blanco*, 392 F.3d at 397. Here, it is far from clear that the CCDA committed a *Brady*
16 or *Giglio* violation in prosecuting Beets. At most, the three instances of alleged non-disclosure cited
17 by Beets show that the state could have been more fastidious in complying with its purported "open
18 file" policy. Second, even in *Blanco*, the court did not order the disclosure of the prosecution's
19 *entire* file. Instead, the government was only required to produce information in its possession that
20 pertained to the confidential informant. *Id.*

21 Beets's "pattern and practice" argument is one that is not new to this court. The
22 Federal Public Defender's Office in this district has routinely advanced this theory to support a
23 request for broad-based discovery in any section 2254 capital habeas case that originated in Clark
24 County. The argument consists of two components: (1) The CCDA has a well-established history of

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26 ⁹ *Giglio v. United States*, 405 U.S. 150 (1972).

1 not complying with its constitutional disclosure obligations in criminal cases; and, (2) the CCDA
2 does not have a system in place to ensure that possible *Brady* material in the possession of various
3 law enforcement agencies is turned over to the defense. According to petitioner, these two premises
4 warrant plenary discovery of the records of any agency that may have played a role in his
5 prosecution.

6 In the past, this court has, in *some* cases, reached the conclusion that the foregoing
7 “pattern and practice” argument established “good cause” to allow *some* discovery in support of
8 either a substantive *Brady* claim or a claim that counsel was ineffective in pursuing pre-trial
9 discovery. *See, e.g., Paine v. McDaniel*, 2:02-CV-1082-KJD-PAL, Order Regarding Discovery,
10 Docket #33, p. 8-16. Here, because Beets’s offers only a vague and highly speculative theory upon
11 which he may be entitled to habeas relief, the court shall substantially limit the discovery he will be
12 allowed to undertake in this area. In so ruling, the court takes instruction from *Bracy* where the
13 Supreme Court suggested that habeas discovery was not necessarily warranted based merely on the
14 fact that the trial judge had been convicted of taking bribes from defendants in criminal cases:

15 . . . We emphasize, though, that petitioner supports his discovery request by
16 pointing not only to Maloney's conviction for bribe taking in other cases, but also to
17 additional evidence, discussed above, that lends support to his claim that Maloney
18 was actually biased *in petitioner's own case*. That is, he presents “specific
19 allegations” that his trial attorney, a former associate of Maloney's in a law practice
20 that was familiar and comfortable with corruption, may have agreed to take this
21 capital case to trial quickly so that petitioner's conviction would deflect any suspicion
22 the rigged *Rosario* and *Chow* cases might attract. . . .

23 *Bracy*, 520 U.S. at 909 (emphasis in original). As discussed above, Beets has made a very weak
24 showing that the prosecution in his case failed to disclose material exculpatory or impeachment
25 evidence.

26 Under these circumstances, the court will not condone a discovery request that would
require the CCDA and various divisions of the LVMPD to scour its records for every shred of
information or material relating to Beets and his crimes. Instead, the court shall limit Beets’s

1 discovery request to a copy of the CCDA criminal file for this particular case,¹⁰ as maintained by the
 2 CCDA in the usual course of business. In addition, the CCDA shall be permitted to withhold from
 3 disclosure materials and information that would not have been subject to discovery in the original
 4 state court case – e.g., attorney notes, legal research, internal memoranda, etc. If, at some point,
 5 Beets can make a more convincing showing that he may be entitled to habeas relief due to the state’s
 6 failure to disclose exculpatory or impeachment evidence, he may renew his request for leave to
 7 conduct discovery.

8 F. Lethal injection as implemented in Nevada constitutes cruel and unusual
 9 punishment.

10 Claiming that Nevada’s lethal injection protocol results in the infliction of
 11 unnecessary pain, Beets requests permission to conduct discovery for the stated purpose of showing
 12 how the State of Nevada intends to carry out his death sentence. Accordingly, he asks for permission
 13 to serve a subpoena on the NDOC that would call for the production of any and all documents in the
 14 Department’s possession that would have any bearing whatsoever on Nevada’s execution protocol.
 15 Exhibit 1.25. In making this request, Beets notes that, historically, the NDOC has kept confidential
 16 some of the records he now seeks to obtain. In addition, he asks for leave to depose the Director of
 17 the NDOC, the Medical Director of the NDOC, the warden of Nevada State Prison, and the Carson
 18 City Fire Chief. Exhibits 1.26-1.29.

19 By statute, Beets’s death sentence is to be carried out by lethal injection. *See Nev.*
 20 *Rev. Stat. 176.355.* Section 176.355(2) assigns the Director of the NDOC several tasks to perform in
 21 relation to executing the death penalty. *Id.* However, neither the Nevada statutes nor the state
 22 court’s sentence in this case require that a specific protocol be followed in administering the lethal
 23 injection itself. Instead, the particular procedures to be used, including the selection of the drug or
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25 ¹⁰ While the CCDA has most likely has assigned its own file number to the case, this court is
 26 referring to the state’s prosecution of state justice court case # 89-FN-00193 and state district court #
 89-C-088206-C.

1 drugs to be administered, are a matter left to the Director of the NDOC after consulting with the state
2 health officer . *Id.*

3 While this scheme would seem to justify some inquiry into the specifics of the NDOC
4 protocol, it also prompts the question of whether Beets's challenge, to the extent that it has been
5 articulated, might be more properly raised in the context of an action brought under 42 U.S.C. §
6 1983. In *Nelson v. Campbell*, 541 U.S. 637 (2004), a state prisoner sentenced to death filed a civil
7 rights action under § 1983 alleging that the state's proposed use of a certain procedure, not mandated
8 by state law, to access his veins during the lethal-injection procedure constituted cruel and unusual
9 punishment. The U.S. Supreme Court reversed the lower courts' conclusion that the claim sounded
10 in habeas corpus and could not be brought as a § 1983 action. Although *Nelson* explicitly states that
11 it leaves unresolved the question as to whether a general challenge to a statutorily mandated method
12 of execution "would call into question the death sentence itself," the Court concluded that § 1983
13 was the appropriate vehicle for the prisoner to challenge the particular lethal-injection procedure
14 proposed by state officials. 541 U.S. at 645. The Court stated that the prisoner's suit challenging "a
15 particular means of effectuating a sentence of death does not directly call into question the 'fact' or
16 'validity' of the sentence itself [because by altering the lethal-injection procedure] the State can go
17 forward with the sentence." 541 U.S. at 644.

18 More recently, in *Hill v. McDonough*, --- U.S. ---, 126 S.Ct. 2096 (2006), the Court
19 reaffirmed the principles in *Nelson*. Upholding the use of § 1983 to challenge a three-drug
20 lethal-injection procedure proposed in Florida, the Court in *Hill* noted that, under Florida law,
21 implementation of lethal injection was left to Florida's department of corrections. 126 S.Ct. at 2102.
22 While neither *Nelson* nor *Hill* hold that habeas corpus relief is unavailable to a prisoner seeking to
23 invalidate a particular lethal injection procedure, both cases suggest that a § 1983 claim may be the
24 more appropriate avenue where, as in this case, the particular procedure under scrutiny is the not the
25 only means by which the state is permitted to carry out the sentence. *See also, Beardslee v.*
26 *Woodford*, 395 F.3d 1064, 1068-69 (9th Cir. 2005) (Death row inmate's claim that California's lethal

1 injection protocol violates the Eighth and First Amendments “is more properly considered as a
2 ‘conditions of confinement’ challenge, which is cognizable under § 1983, than as a challenge that
3 would implicate the legality of his sentence and thus be appropriate for federal habeas review.”).

4 Until Beets’s challenge to the Nevada lethal injection protocol is set forth in a formal
5 pleading, this court shall reserve judgment as to whether the claim must be brought as a habeas claim
6 or as a § 1983 claim. Until that time, this court is not inclined to abide the hard-fought and
7 protracted discovery dispute that would inevitably result if Beets were granted permission to
8 subpoena extensive records from the NDOC. Thus, in the interest of moving this case forward to, at
9 least, the filing of the amended petition (see docket #52), Beets’s discovery request as it relates to
10 Nevada’s lethal injection protocol shall be denied at this point in the proceedings. *See Lonchar v.*
11 *Thomas*, 517 U.S. 314, 325-26 (1996) (recognizing the substantial discretion afforded the district
12 court by the habeas rules in the conduct of a case, including the decision whether to allow
13 discovery). As with the denial of Beets’s request to conduct discovery of possible *Brady* evidence,
14 the court’s denial of discovery regarding Nevada’s lethal injection protocol does not foreclose Beets
15 from renewing his request, as appropriate, at some future point.

16 VI. Respondents’ Motion to Dismiss

17 Respondents have moved to dismiss this action on the ground that Beets has not filed
18 a habeas petition that complies with Rule 2 of the Rules Governing Habeas Corpus Cases Under
19 Section 2254. As noted above, Beets’s petition does not contain grounds for relief drafted
20 specifically for this federal habeas proceeding. Docket #1. Instead, it simply incorporates by
21 reference the constitutional claims raised in his attached state appellate briefs. *Id.* Respondents
22 argue that Beets’s filing does not constitute a “petition” as contemplated by Rule 2 and, more
23 specifically, that it deviates from the standard format called for by Rule 2(d).

24 Respondents cite no legal authority for the position that a pleading that fails to
25 comply with Rule 2 must be dismissed. Prior to being amended in 2004, Rule 2(e) provided for the
26 return of insufficient petitions. However, that provision was eliminated to preclude the harsh result

1 of a subsequent petition being barred under the 28 U.S.C. § 2244(d)(1). *See* Advisory Committee
2 Notes for Habeas Rule 2, 2004 Amendments. The habeas rules are now designed for the court to
3 allow the defective petition and to require the petitioner to submit a corrected petition. *Id.*

4 Thus, even assuming that Beets's current petition is insufficient under Rule 2, the
5 habeas rules do not call for dismissal. The scheduling orders governing this case call for Beets to
6 file an amended petition, with the assistance of counsel, at the conclusion of the initial discovery
7 phase. Docket ##12/52. Accordingly, the court shall deny respondents' motion to dismiss.

8 **IT IS THEREFORE ORDERED** that petitioner's Motion for Leave to Conduct
9 Discovery (docket #18) is **GRANTED IN PART AND DENIED IN PART**, as is further described
10 in this order.

11 **IT IS FURTHER ORDERED** that petitioner is GRANTED leave to serve
12 subpoenas in the form found at Exhibits 1.09, 1.13, 1.18, 1.19, 1.20, and 1.22.

13 **IT IS FURTHER ORDERED** that petitioner is GRANTED leave to serve the
14 subpoena found at Exhibit 1.01, but only after it is edited so that the material to be produced is
15 limited to the CCDA criminal file concerning the prosecution of state justice court case #
16 89-FN-00193 and state district court # 89-C-088206-C, as maintained by the CCDA in the usual
17 course of business. The subpoena shall also clarify that the CCDA is required to disclose only
18 materials and information subject to discovery pursuant to open file discovery or pursuant to *Brady*
19 *v. Maryland*, 373 U.S. 83 (1963), and progeny.

20 **IT IS FURTHER ORDERED** that petitioner is GRANTED leave to serve
21 subpoenas in the form found at Exhibit 1.10, but only after Item 8 of Attachment A is edited to read,
22 "Any of the items above that are maintained as electronic data or in an electronic format.";

23 **IT IS FURTHER ORDERED** that petitioner is GRANTED leave to serve Exhibit
24 1.12, but only after Item 1 of Attachment A is edited so as to limit its scope to materials concerning
25 the actual selection process in Beets's case and the standard procedures in effect at the time;

26 **IT IS FURTHER ORDERED** that petitioner is GRANTED leave to serve Exhibits

1 1.14 and 1.15, but only after Items 3, 4, 5, and 6 of each Attachment A are deleted.

2 **IT IS FURTHER ORDERED** that petitioner is DENIED leave to serve the
3 subpoenas found at Exhibits 1.02, 1.03, 1.04, 1.05, 1.08, 1.16, 1.17, 1.21, 1.23, 1.24, 1.25, 1.26,
4 1.27, 1.28, and 1.29.

5 **IT IS FURTHER ORDERED** that, in all other respects, the schedule for further
6 litigation of this action shall be controlled by the Second Scheduling Order entered on December 15,
7 2005 (docket #12), as modified by the minute order entered on January 9, 2007 (docket #52).

8 **IT IS FURTHER ORDERED** that respondents' motion to dismiss (docket #46) is
9 **DENIED.**

10 DATED: February 12, 2007

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UNITED STATES DISTRICT JUDGE
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